UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of HARVEY CONSTRUCTION CORPORATION Employer[1] and NEW ENGLAND REGIONAL COUNCIL OF CARPENTERS, a/w UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA Petitioner	Case 1-RC-22375

DECISION AND ORDER[2]

The Employer, Harvey Construction Corporation (Harvey Construction), is engaged in the construction industry as a construction manager and general contractor.

[1] The name of the Employer appears as amended at the hearing.

[2] Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

I hereby deny the Employer's request, pursuant to the Board's Rules and Regulations Section 102.67, for leave to file a reply brief, as it has no shown no circumstances to warrant the grant of its request.

Petitioner New England Regional Council of Carpenters (NERCC) seeks to represent a unit of carpenters who were employed by Harvey Construction pursuant to a recently expired 8(f) agreement. Harvey Construction maintains that the petition should be dismissed on the ground that it does not currently employ any carpenters and that none of the carpenters it previously employed has a reasonable expectation of employment. I find there is no evidence that Harvey Construction will employ carpenters in the future and shall, therefore, dismiss the petition.

Facts

Harvey Construction is a construction manager and general contractor that has been in business since 1992. Over the years, it has been a party to a series of 8(f) agreements with NERCC. Harvey Construction employed carpenters and applied the terms of the agreements to those carpenters.

The most recent agreement was scheduled to expire on September 30, 2009. By letter dated June 10, 2009, Harvey Construction sent a notice of termination to NERCC. At some point prior to expiration, the parties met to discuss a successor agreement. John Henry Zahr, president and majority owner of Harvey Construction, testified at the hearing that he told NERCC representatives that it would be impossible for him to stay in business unless NERCC agreed to eliminate an existing subcontracting article from the agreement. The NERCC representatives rejected his demand to remove the subcontracting article and told him that Harvey Construction would, in turn, have to make a business decision. As a result, Zahr decided not to enter into a successor agreement, and the agreement expired on September 30, 2009.

As of September 30, 2009, Harvey Construction employed about six long-term carpenters. Zahr testified that all of them told Harvey Construction that they had been told by their business agent that they could no longer work for Harvey Construction because it was not signatory to an agreement with the NERCC.[3] NERCC business agent John Jackson also told Zahr that he would not allow the carpenters to continue working for Harvey Construction because it was not signatory to an agreement.

Zahr testified that, if the parties had reached an agreement without a subcontracting clause, or if the carpenters had agreed to continue to work for the firm without a contract after September 30th, he would have had work for the carpenters and would have continued to employ them. Zahr testified, however, that on October 1, having been notified by NERCC and the carpenters that the Union would not permit them to work, he made the decision to change the way he does business by becoming a "construction manager" with regard to carpentry work, i.e., subcontracting all future carpentry work. He testified that there has been carpentry work available since October 1, and that subcontractors have been performing it.

[3] No carpenter employees testified at the hearing.

Zahr testified that Harvey Construction has employed laborers and perhaps a mason since October 1. He testified that, in his opinion, a construction manager may still employ employees.

NERCC Business Agent Jackson testified that, in the past, he has dealt with Harvey Construction's head superintendent/operations person, Doug Zimba, with respect to referring carpenters for work. Zimba would tell him about the jobs Harvey Construction was bidding for and let him know when carpenters were going to be laid off. Jackson testified that, in July or August 2009, he called Zimba to discuss what would happen at the end of the contract term. Zimba asked Jackson if there was any possible way that Harvey Construction could keep the carpenters as employees. Jackson said there was no way they could continue to work unless there was a signed agreement.

Analysis

The Board has consistently held that it will not conduct an election at a time when, for a variety of reasons including subcontracting, there is no evidence that the employer will have any work for the petitioned-for employees in the future. *Hughes Aircraft*[4] (petitions dismissed because of the employer's imminent cessation of its guard operations through subcontracting); *Douglas Motors Corp.*[5] (evidence indicates with sufficient definiteness that a fundamental change in the nature of the Employer's business operations is presently in process, where the manufacturing aspect of its business will be eliminated due to plans to subcontract production). See also, *Martin Marietta*[6] (petition dismissed where closure of the plant is definite and imminent); *M.B. Kahn Construction Co.*[7] (petition dismissed in view of the imminent completion of the construction project involved). Cf. *MJM Studios of New York, Inc.*[8] (election directed where reduction in the current levels of carpenters and welders is not the result of a "fundamental change" in the employer's operations, as the employer does not contend that it is shifting to a different type of business operation or eliminating its carpentry and welding departments).

Based on the Zahr's testimony that he has decided to use subcontractors to perform all future carpentry work, I find that there is no evidence that Harvey Construction will employ carpenters in the future. Therefore, I shall dismiss the petition. In reaching this conclusion, I acknowledge that that the record evidence of Harvey Construction's subcontracting efforts is not as substantial as the evidence in *Hughes Aircraft* and *Douglas Motors Corps*, cited above, in that Harvey Construction submitted

[4] 308 NLRB 82 (1992).

[5] 128 NLRB 307 (1960).

[6] 214 NLRB 646, 646-647 (1974).

[7] 210 NLRB 1050 (1974).

[8] 336 NLRB 1255, 1256 (2001).

no documentary evidence concerning Zahr's decision or actual subcontracts. Nonetheless, Zahr's testimony was unrebutted that 1) on October 1, he made the decision to subcontract all future carpentry work, and 2) there has been carpentry work available since October 1, which has been performed by subcontractors.

NERCC argues that Harvey's continued employment of individuals in other trades, i.e., laborers and a mason, belies its claim that it has become a construction manager and will subcontract all future carpentry work. There is no support in the record, however, for NERCC's contention that a construction manager is an entity that subcontracts *all* construction trades work and does not itself perform *any* such work and that a construction firm may not opt to be a construction manager for purposes of carpentry work while itself performing work in the other trades. In fact, the only record evidence on this point is the testimony of Zahr, who testified that a firm may still be a construction manager if it employs employees in some trades.

NERCC questions the veracity and sincerity of Zahr's assertion that he does not intend to employ carpenters, *inter alia*, on the ground that there is no evidence of a change in the ongoing contracts on which its carpenters worked, so that Harvey will continue to need carpentry work performed. However, the fact that Harvey has ongoing carpentry work, which is undisputed, does not undermine the *bona fides* of its decision to subcontract that work rather to hire its own carpenters to perform it.

NERCC asserts that whether an employee who is no longer working for an employer can vote in an election depends on whether the employees had, at the time of the election, a reasonable expectation of re-employment within a reasonable time in the future. I note, first, that the line of cases cited by NERCC with respect to this argument is inapt, as they merely addressed the eligibility of individual voters in circumstances where the appropriateness of holding an election at all was undisputed.[9] Here, in contrast, the Region is faced with the elimination of an entire line of the Employer's business, calling into question whether there are any unit employees at all. Second, the cases cited by NERCC involved employees who were laid off by their employer, unlike Harvey's carpenters, who themselves chose to leave their jobs rather than work under the terms offered. Thus, this line of cases is inapplicable.

Even if this line of cases were applicable, NERCC has failed to demonstrate that the carpenters have a reasonable expectation of employment. In this regard, NERCC argues that Zahr testified he would have continued to employ the carpenters after the 8(f) agreement expired if he could have,[10] and NERCC suggests there are several scenarios

[9] The Petitioner cites *NLRB v. Jesse Jones Sausage Co*., 309 F.2d 664, 665 (4th Cir. 1964) and *Hughes Christensen Co. v. NLRB*, 101 F.3d 28, 31(5th Cir. 1996).

[10] NERCC also relies on the fact that Superintendent Zimba asked Jackson if there was any way possible that Harvey could keep the carpenters. I note that, assuming Zimba had authority to decide whether or not Harvey would employ the carpenters after October 1, which is not established by the record, the referenced conversation took place in July or August of 2009. Harvey's position subsequently changed on October 1, when the majority owner, Zahr, made his

under which the carpenters could reasonably be recalled, including 1) Harvey and NERCC reach an accommodation on the subcontracting agreement and execute a new agreement; 2) Harvey fails to find a willing subcontractor and has no choice but to directly hire carpenters again; and 3) Harvey persuades the carpenters to resign from the Union and to return to its employ. I find that all of these scenarios are far too speculative to warrant holding an election at this time.[11]

NERCC argues, alternatively, that the six carpenters recently employed by Harvey Construction are strikers who are engaged in a work stoppage, brought about by Harvey Construction's refusal to become signatory to a new contract. Citing *Lamb-Grey's Harbor Co.*[12] and *Kable Printing Co.,*[13] NERCC asserts that, as economic strikers whose jobs were eliminated for reasons wholly related to the strike, the carpenters remain eligible to vote in an election.

The flaw in NERCC's argument is that there is no record evidence that the carpenters are actually engaged in a strike. Thus, there is no evidence, for example, that the carpenters took a strike vote or picketed Harvey Construction, nor any other evidence that either the carpenter employees or NERCC have ever communicated to Harvey Construction that the carpenters are withholding their labor temporarily as a form of protest or in order to pressure Harvey Construction to change its position about the subcontracting clause. Rather, the carpenter employees and NERCC merely notified Harvey Construction that the carpenters could not continue to work there under the terms offered, and they left without any indication that they would be willing to return if the parties reached agreement. In determining the existence of strike activity in the unfair labor practice context, for instance, the Board has distinguished between an employee's withholding of services pending desired remedial action by the employer, and abandonment of employment with no intention of returning. *E.L.C. Electric, Inc.*[14] (employees voluntarily quit with no intention of returning rather than engaged in a *bona fide* strike where, *inter alia*, they never took any action in support of their purported strike, otherwise returned to the employer's jobsites, or engaged in any other conduct

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decision to subcontract future carpentry work. In any event, vague statements by the employer about the chance or possibility of an employee being rehired will not overcome the totality of the evidence to the contrary, particularly when any possible suggestion of intent to recall is firmly disavowed by the date of the election. Cf. *Sol-Jack*, 286 NLRB 1173, 1173-1174.

[11] Should NERCC be able to demonstrate in the future that Harvey actually employs any carpenters, I will entertain a motion to reinstate the petition. *Davey McKee Corp.*, 308 NLRB 839 (1992) (where the petition was dismissed due to imminent completion of construction projects, Regional Director will entertain a motion to reinstate petition should the employer acquire additional construction projects covering the employees described in the petition).

[12] 295 NLRB 355, 357 (1989).

[13] 238 NLRB 1092, 1096 (1978).

[14] 344 NLRB 1200, ALJD at 1216 (2005).

evidencing an interest in ever returning to work for the employer); *Eaborn Trucking Service*[15] (drivers who gave no indication that they were striking made a voluntary choice to quit their employment rather than continue to work at their current wages).[16]

ORDER

IT IS HEREBY ORDERED that the petition is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by November 18, 2009**.** The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[17] but may not be filed by facsimile.

/s/ Ronald S. Cohen

Ronald S. Cohen, Acting Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
This 4th day of November, 2009

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[15] 156 NLRB 1370 (1966).

[16] No unfair labor practice charges have been filed on this matter.

[17] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.